INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Argument	13
Conclusion	24
Appendix	26

CITATIONS

Cases:

American Power and Light Co. v. *Securities and Exchange Commission*, 329 U. S. 90	15
Central & South West Utilities Co. v. *Securities and Exchange Commission*, 136 F. 2d 273	17, 28
Commonwealth & Southern Corp., 11 S. E. C. 138, affirmed, *sub nom. Commonwealth & Southern Corp.* v. *Securities and Exchange Commission*, 134 F. 2d 747	16
Commonwealth & Southern Corp., In re, 184 F. 2d 81, certiorari denied, 340 U. S. 929	5, 13
Community Gas and Power Co., In re, 71 F. Supp. 171, affirmed, 168 F. 2d 740, certiorari denied, 334 U. S. 846	19
Leventritt v. *Securities and Exchange Commission*, 178 F. 2d 336	23
Lownsbury v. *Securities and Exchange Commission*, 151 F. 2d 217, certiorari denied, 326 U. S. 782	22
Niagara Hudson Power Corp. v. *Leventritt*, 340 U. S. 336	5, 8, 13
North American Co. v. *Securities and Exchange Commission*, 327 U. S. 686	17
Okin v. *Securities and Exchange Commission*, 145 F. 2d 206, remanded, 325 U. S. 840	22
Phillips v. *Securities and Exchange Commission*, 185 F. 2d 746	23
Reconstruction Finance Corporation v. *Denver & R. G. W. R. Co.*, 328 U. S. 495	18
Securities and Exchange Commission v. *Central-Illinois Securities Corp.*, 338 U. S. 96	22
Securities and Exchange Commission v. *Leventritt*, 179 F. 2d 615, reversed *sub nom. Niagara Hudson Power Corp.* v. *Leventritt*, 340 U. S. 336	17
The United Corporation, 13 S. E. C. 854	4

Cases—Continued Page

United Gas Corporation, 16 S. E. C. 531, affirmed, 58 F. Supp. 501 17

United Gas Improvement Co. v. *Securities and Exchange Commission*, 138 F. 2d 1010 17

Statutes:

Investment Company Act of 1940, 15 U. S. C. 80a 6

Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. 79):

Section 1 15

Section 1 (b) (1) 16, 26

Section 1 (c) 16, 27

Section 2 (a) (9) 15, 27

Section 5 (d) 6, 7, 27

Section 7 15

Section 7 (d) 16, 27

Section 11 (b) 28

Section 11 (b) (2) 5, 14, 18, 19, 28

Section 11 (e) 6, 14, 20, 29

Section 24 (a) 9, 10, 28, 29

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 184

THE GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION, PETITIONER

v.

THE SECURITIES AND EXCHANGE COMMISSION, THE UNITED CORPORATION, EDWARD R. DOWNING, RANDOLPH PHILLIPS, AND 22,081 STOCKHOLDERS OF THE UNITED CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The findings, opinions, and order of the Securities and Exchange Commission (R. 5–49) are not yet officially reported, but are set forth in Holding Company Act Releases Nos. 10,614 and 10,643. The opinion of the Court of Appeals (R. 391–416) is reported in 203 F. 2d 611.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1953 (R. 417–418). A petition for rehearing was denied on April 22, 1953 (R. 437). The petition for a writ of certiorari was filed on July 16, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935, 15 U. S. C. 79x (a).

QUESTIONS PRESENTED

1. Where a holding company has option warrants outstanding which the Securities and Exchange Commission, after hearing, found to have no measurable investment value, did the Commission, in approving a plan of reorganization under Section 11 (e) of the Public Utility Holding Company Act providing for elimination of the warrants, make the requisite statutory findings that the continued existence of the warrants constitute an undue or unnecessary complexity under the standards of Section 11 (b) (2).

2. Where the above plan contemplated both the elimination of the holding company's option warrants and the divestment of securities so that the holding company would cease to be a holding company, did a partial divestment of the securities to the point where the holding company held less than a 10 percent interest in any public-utility company destroy the statutory basis for the Commission's order requiring the elimination

of the warrants under the standards of Section 11 (b) (2).

3. Under Section 24 (a) of the Public Utility Holding Company Act, can the jurisdiction of a court of appeals to review orders of the Securities and Exchange Commission extend to those provisions of a plan which, both by its terms and by order of the Commission, are to become operative only after approval and enforcement by a district court upon application by the Commission pursuant to Section 11 (e) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Public Utility Holding Company Act of 1935 are set forth in the Appendix, *infra*, pp. 26–30.

STATEMENT

Petitioner seeks review of the order of the court below only insofar as it upheld the Securities and Exchange Commission's approval of that part of a plan of reorganization for The United Corporation ("United") which cancels United's option warrants. Another phase of the same order is the subject of a separate petition in No. 154, as to which a separate brief in opposition has been filed.

United, a Delaware corporation organized in 1929, is registered as a holding company under the Public Utility Holding Company Act of 1935. At one time it controlled, directly or indirectly, many gas and electric utility companies

along the Eastern seaboard and adjoining area (R. 6).[1]

On August 14, 1943, the Commission ordered United to cease to be a holding company and to limit its corporate structure to a single class of stock, namely common stock (R. 6, 362-363). Since the entry of that order, United has retired its preference stock by exchange for underlying portfolio securities and cash (R. 6). Additional portfolio securities were disposed of through market sales and dividend distributions (R. 6).

As of December 31, 1950, United had outstanding 14,529,491.5 shares of common stock. It also had outstanding option warrants entitling the holders thereof to purchase a total of 3,732,059 shares of common stock at any time at a price of $37.50 per share (R. 7). The option warrant, as the Commission found (R. 27-28), confers upon its holder no right or interest in the present assets and earnings of United, but merely a right without limit of time to purchase United's common stock upon tender of the subscription price. The warrant holder has no right to require that earnings of United be retained to improve the value of the common stock subject to the option, and United is permitted to capitalize its earnings by issuing additional shares of common stock as stock dividends, with no adjustment in the option

[1] A detailed account of the organization of United and of its acquisitions is described in *The United Corporation*, 13 S. E. C. 854, 856-864, 866-871 (1943).

price.' Except for differences in the exercise price, the terms of the option warrants are substantially the same as those involved in the *Niagara Hudson* and *Commonwealth & Southern* cases.[2]

United's assets, at market values as of December 31, 1950, consisted approximately of $57,600,000 of securities and of about $2,000,000 in cash and government bonds, equivalent to $4.12 per share of common stock (R. 7). The securities consisted of common stocks of utility operating and holding companies, including 11.9% of the total voting stock of Niagara Mohawk Power Corporation ("Niagara Mohawk"); 26.3% of the common stock of South Jersey Gas Company ("South Jersey"); 5.8% of the capital stock of The United Gas Improvement Company ("UGI"); 5.5% of the common stock of The Columbia Gas System, Inc. ("Columbia"); and common stocks of other companies in amounts less than 5% of the total outstanding (R. 7-8).

As its final act of compliance with Section 11 (b) (2) of the Act (Appendix, *infra*, p. 28) and with the Commission's 1948 order, United submitted a plan providing for the sale by United of all of its South Jersey common stock and the sale of

---

[1] Provision is made for adjustment of the option price in the event of a stock split, as distinguished from a stock dividend.

[2] See *Niagara Hudson Power Corporation v. Leventritt*, 340 U. S. 336; *In re Commonwealth & Southern Corp.*, 184 F. 2d 81 (C. A. 3), certiorari denied, 340 U. S. 929.

sufficient amounts of its stockholdings in Niagara Mohawk, Columbia Gas, and UGI so that its holdings would not exceed 4.9 percent of the voting stocks of each of these companies. The plan also contemplated that United's registration as a holding company would be terminated upon a future application by United under Section 5 (d) of the Act (Appendix, *infra*, p. 27), to be made after such divestments. Thereafter, United would continue to do business as an investment company registered under the Investment Company Act of 1940, 15 U. S. C. 80a (R. 8-9). These provisions in the plan, and others not here material, were to become operative immediately and were not conditioned upon enforcement by a district court (R. 48).

The plan further provided for the elimination of United's option warrants and for modification of United's certificate of incorporation and by-laws in regard to cumulative voting and enlarged quorum requirements at stockholders' meetings (R. 9). With respect to these provisions of the plan, United requested the Commission to apply for court enforcement pursuant to Section 11 (e) of the Act (Appendix, *infra*, p. 29). That section provides that the Commission may apply for such enforcement at the request of the company proposing a plan and provides for enforcement only if a district court, "after notice and opportunity for hearing," shall approve the plan as "necessary to effectuate" the provisions of Sec-

tion 11 (b) and "fair and equitable to the persons affected."

After extensive hearings, the Commission approved United's plan, as amended in accordance with the Commission's findings (R. 47–49). The Commission found that the divestments proposed by the plan would further advance United's compliance with Section 11 (b) (2) and the Commission's 1943 order thereunder (R. 9–10). The Commission deferred the question whether further divestments may be necessary to make United cease to be a holding company under the Act until such divestments are completed and an application under Section 5 (d) (Appendix, *infra*, p. 27) is presented by United to terminate its registration as a holding company under the Act (R. 10–11).

As to the option warrants, the Commission concluded (1) that to permit them to remain outstanding "would be inherently deceptive to investors and perpetuate in the corporate structure useless and unnecessary complexities, in contravention of the requirements of Section 11 (b) (2)" (R. 30), and (2) that it was unable to find "that there is a reasonable expectation that United's earnings and assets over the foreseeable future will be such that the market price of its common stock will increase to the extent needed to give the warrants a recognizable value" (R. 30). In accordance with its consistent interpretation of the "fair and equitable" standard, the

Commission concluded that the warrants represent no measurable investment value in the enterprise. Accordingly, the holders thereof could not receive any compensation at the expense of the common stockholders for the elimination of the warrants. See *Niagara Hudson Power Corporation* v. *Leventritt*, 340 U. S. 336.[4]

In respect of the provisions of the plan as to which district court enforcement was contemplated, the Commission's order expressly provides (R. 48):

> The order entered herein shall not be operative to authorize the consummation of the provisions of the plan as amended relating to the cancellation of United's option warrants or to the amendment of United's Certificate of Incorporation or By-Laws until an appropriate United

[4] The Commission found that the exercise price of $27.50 per share represents "approximately 130 times the net income applicable to United's present portfolio which we have previously found could be appropriately used in testing the fairness of the plan" and that it is approximately 90 times such earnings if the option price were adjusted to reflect certain capital distributions by United (R. 28). The Commission found that in terms of asset values United's present assets of about 60 million dollars would have to appreciate approximately 585% in order to give a value to the warrants at the exercise price, or 360% if adjusted to reflect the capital distributions by United (R. 30). In terms of market price, the Commission noted that the common stock of United was recently selling at a high of 4¾, so that an increase of about 5.8 times would have to be attained in order to reach the exercise price (R. 30).

States District Court shall, upon application thereto, enter an order enforcing said provisions.

In view of the prospect that review in a court of appeals might be sought as to other phases of the plan, the Commission stated that it would "defer applying for court enforcement for the time being" (R. 48).

A petition to review pursuant to Section 24 (a) of the Act (Appendix, *infra*, pp. 29–30) was filed in the court below by certain common stockholders who are now petitioners in No. 154. These stockholders sought review only as to those phases of the plan which were objectionable to them and which were to be operative without district court enforcement. However, they also moved in their petition that the court below rather than a district court should enforce those provisions of the plan which they favored and which were to be operative only in the event of enforcement, including the proposed elimination of the warrants (R. 394–395)[1].

On October 26, 1951, while the stockholders' motion for enforcement in the court below was pending and after the Commission had challenged the court's jurisdiction with respect to the provisions of the plan affecting the warrants, petitioner filed in the court below a motion for leave

[1] The court below ultimately agreed with the Commission that it had no jurisdiction to enforce and this is not in dispute.

to intervene (R. 209–212). Petitioner's moving papers attacked the merits of the plan insofar as it affected the warrants (R. 229–232). In explanation of its reasons for seeking intervention, petitioner stated that it "could not have itself filed a petition to review the Commission's order of June 26, 1951," since the provision to which it objected was dependent upon proceedings in a district court (R. 210). In view of the stockholders' petition, however, and the provision of Section 24 (a), with respect to the reviewing court's "exclusive jurisdiction to affirm, modify, or set aside such order," petitioner stated that it had an interest because the order of the Commission "if affirmed, and the plan, if enforced, would make the warrants worthless" (R. 211). On the other hand, the Commission urged that the court below had no jurisdiction at all with respect to those provisions of the plan which under Section 11 (e) are subject to enforcement in the district court, and that an affirmance of the Commission's order in respect to matters properly before it under Section 24 (a) would not encompass *ex proprio vigore* the order in its entirety (R. 214–219). An answer objecting to petitioner's motion on jurisdictional grounds was also filed by United (R. 221–223). In its reply (R. 224–227), petitioner did not endorse the Commission's views on the exclusive jurisdiction of the district court under Section 11 (e). It reiterated its views that the "exclusive jurisdiction" under Section 24 (a)

might extend to other aspects of the plan, regardless of the particular circumstances that occasioned the review proceedings initially. Petitioner further stated (R. 225–226): "The assumption of jurisdiction by this Court *of the entire order* of the Commission will expedite an early final determination of the case since this Court, by its orders of November 5, 1951, has evidenced its intention of expediting the matter, and *since this Court has jurisdiction under Section 24 (a) of the Act to settle the matter finally without sending it back to the Commission for further proceedings.*" [Italics added.]

The court below deferred its decision on petitioner's motion for leave to intervene until submission of the case on the merits and granted petitioner leave to file a brief and to present oral argument (R. 234). Petitioner filed a brief addressed to the merits of the plan's treatment of the option warrants and an appendix to its brief (R. 54–208), setting forth the portions of the record it deemed pertinent to a consideration of its case. Petitioner also presented oral argument which, by order of the court, was limited to the merits (R. 387).

After consideration of the entire case on the merits, the court below granted petitioner's motion to intervene (R. 395–396, 417). It held that under Section 24 (a) of the Act it had jurisdiction to review the order of the Commission in its entirety, including that part which pertained to the

warrants, since no enforcement proceedings were pending in the district court when the review proceedings were initiated in the court below (R. 397–409). It held, however, that upon affirmance it could not enforce these phases of the plan, and to that end further proceedings must be had in the district court, wherein its order of affirmance would be *res judicata* (R. 406–407). On the merits, the court affirmed the Commission's findings that the provision for eliminating option warrants is required by the standards of Section 11 (b) (2) and is fair and equitable (R. 416), stating that the findings of the Commission that the warrants had no measurable value "are supported by evidence which we regard as substantial" (R. 415).

While the review proceedings were pending in the court below, petitioner filed motions seeking leave to adduce additional evidence (R. 396). These motions sought to show that since the Commission's approval of the plan United had disposed of its entire investment in South Jersey and that United's holdings in Niagara Mohawk had been reduced to less than 10% (R. 364–386). As previously noted, the plan itself expressly contemplated the sale of United's stock interest in South Jersey and a reduction in its investments in Niagara Mohawk to less than 5%. The court below denied these motions (R. 388, 396, 417–418).

A petition for rehearing was filed by the petitioner on April 13, 1953, based solely upon petitioner's motions for leave to adduce additional evidence (R. 419–452). No issue was raised in that petition as to the jurisdiction of the court below regarding the part of the plan affecting the warrants. The petition was denied by the court below on April 22, 1953 (R. 437).

ARGUMENT

The court below affirmed the Commission's findings that the propriety of the cancellation of the warrants, without according cash compensation or new warrants, was supported by substantial evidence. These concurrent determinations by the Commission and the court below are in accordance with the criteria of fairness applicable in reorganizations under Section 11 (e) of the Act. See *Niagara Hudson Power Corp.* v. *Leventritt*, 340 U. S. 336; *In re Commonwealth & Southern Corp.*, 184 F. 2d 81 (C. A. 3), certiorari denied, 340 U. S. 929. The petition for a writ of certiorari is not based upon an attack on these questions.[4] Petitioner does argue, however: (1) that the Commission did not make adequate findings as required by Section 11 (b) (2) to show that the warrants of United constituted an undue

[4] Petitioner states (Pet. 2, fn. 1) that if certiorari is granted as to the issues it deems substantial, it will present these questions "if this Court should desire to hear argument thereon."

and unnecessary complexity in the holding-company systems (Pet. 11–15); (2) that it was an abuse of discretion for the court to deny petitioner's motions for leave to adduce additional evidence (Pet. 15–19); and (3) that the court below did not have jurisdiction to review the plan's treatment of the warrants, in view of the proceeding for district court enforcement contemplated under Section 11 (e) (Pet. 8–11). In our view, none of these contentions warrants further review by this Court at this time.

1. Petitioner argues (Pet. 11–15) that the Commission did not make the requisite finding that the elimination of the warrants is required under the corporate simplification standards of Section 11 (b) (2). Under Section 11 (e), the Commission must find that the plan is "necessary to effectuate the provisions" of Section 11 (b). Section 11 (b) (2) in turn provides that the Commission shall direct each holding company and every other company in the holding company system to "take such steps as the Commission shall find necessary to ensure that the corporate structure * * * of any company in the holding-company system does not unduly or unnecessarily complicate the structure, * * * of such holding-company system."

In the instant case, the Commission, on the basis of findings that the warrants had no value, stated (R. 30): "We further find that the continuance of the option warrants, representing as

they do such an extremely tenuous right, would be inherently deceptive to investors and perpetuate in the corporate structure useless and unnecessary complexities, in contravention of the requirements of Section 11 (b) (2)." Petitioner contends (Pet. 14) that this is a finding by the Commission only that the existence of the warrants complicated the corporate structure of United itself, but that there is no finding "that the warrants made the structure of the system intricate or difficult to understand or prevented The United Corporation from performing its functions or burdened the system."

This argument overlooks Section 2 (a) (9) of the Act (Appendix, *infra*, p. 27), which defines a "holding-company system" to mean "any holding company, together with all its subsidiary companies * * *." Hence, undue and unnecessary complications in the corporate structure of a holding company would by the same token "complicate the structure * * * of such holding-company system." The correctness of the Commission's determination is equally manifest if we look beyond the literal words of the statute to other provisions of the Act which, as this Court has held, afford interpretative guides to the standards of Section 11 (b) (2). *American Power and Light Co.* v. *SEC*, 329 U. S. 90, 105. Both Sections 1 and 7 (Appendix, *infra*, pp. 26–27, 27–28) show Congressional concern with the evils and abuses stemming from the issuance of securities by

holding companies and their subsidiaries when such securities are based on fictitious or unsound asset values and not appropriately adapted to their earning power;[3] and it was upon such findings that the Commission directed the elimination of United's warrants under Section 11 (b) (2) (see p. 8, *supra*).[4] In that respect the Commission's find-

[3] Under Section 7 (d) of the Act, the Commission may authorize the issuance of new securities by a registered holding company or any subsidiary company thereof unless "the security is not reasonably adapted to the security structure" of the issuer and any other companies in the same holding-company system, or if "the security is not reasonably adapted to the earning power" of the issuer. Section 1 (b) (1) recites, among other things, "that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies * * * are or may be adversely affected" when, *inter alia*, "such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties * * * or in anticipation of excessive revenues from subsidiary public-utility companies." Section 1 (c) directs that all the provisions of the Act shall be interpreted to eliminate these and other evils.

[4] Petitioner erroneously relies (Pet. 12, fn. 6) on a statement by the Commission in *Commonwealth & Southern Corp.*, 11 SEC 138, 152 (1942), affirmed, *sub nom.*, *Commonwealth & Southern Corp.* v. *SEC*, 134 F. 2d 747 (C. A. 3). The statement referred to merely states that a finding of undue and unnecessary complexity is not based on the mere number of securities which the holding company has outstanding. The Commission's opinion (p. 153) expressly finds, as in the instant case, that Commonwealth's corporate structure, which included preferred stock, contravened Section 11 (b) (2) "because of the *inadequacy and inappropriateness of the underlying structure for the support and maintenance of Commonwealth's security structure.*" [Emphasis in original.]

ings did not differ materially from those in prior cases in which it has ordered the simplification of holding-company structures found unduly complex. See *United Gas Corp.*, 16 S. E. C. 531, 559 (1944), affirmed, 58 F. Supp. 501, 519 (D. Del.) (option warrants); *Central & South West Utilities Co.* v. *SEC*, 136 F. 2d 273, 275 (C. A. D. C.) (preferred stock).* The Commission was not required, however, to determine whether the warrants adversely affected the operations of United or its subsidiaries, or involved other aspects of the various evils which prompted the Congress to deal broadly with over-capitalization and complications in the structure of holding companies. See *North American Co.* v. *SEC*, 327 U. S. 686, 710–711; *cf. United Gas Improvement Co.* v. *SEC*, 138 F. 2d 1010, 1020 (C. A. 3).

2. Petitioner contends (Pet. 15–19) that it was error for the court below to deny its motions for leave to adduce additional evidence. This "additional evidence" was intended to show that since the Commission's approval of the plan United had divested itself of its stock interest in South Jersey and that United's interest in

* See also *SEC* v. *Leventritt*, 179 F. 2d 615, 616 (C. A. 2), reversed on other grounds, *sub nom.*, *Niagara Hudson Power Corp.* v. *Leventritt*, 340 U. S. 336, where the court, although finding that the warrants appeared to have some value, stated that the possible increase in the capital of the company which may arise if the warrant should be exercised might be deemed to be "certainly a needless, and perhaps a disturbing," complexity in the structure of the company.

Niagara Mohawk was reduced to less than 10%. As already noted (pp. 5-6, *supra*), the sale by United of the South Jersey stock and the reduction of its interest in Niagara Mohawk to 4.8%—rather than less than 10%—was specifically contemplated by the plan. Accordingly, these events and transactions do not constitute new and unforeseen developments upon which such a motion may be granted. See *Reconstruction Finance Corporation* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 521-522; *Central & South West Utilities Co.* v. *SEC*, 136 F. 2d 273, 275 (C. A. D. C.).

Although framed in the guise of a motion for leave to adduce additional evidence, petitioner's argument really is (Pet. 7, 14, 15) that, since the plan contemplates that United will cease to be a holding company under the Act and become an investment company, and since as a consequence of its divestments United may have already ceased to be a holding company, the Commission has no jurisdiction to require the cancellation of the warrants as an undue and unnecessary complexity under Section 11 (b) (2), notwithstanding the Commission's finding—which petitioner does not challenge in its petition—that the warrants were without value. But petitioner is mistaken in its construction of Section 11 (b) (2). United is a registered holding company. By virtue of this status it is subject to all the provisions of the Act, including Section 11 (b) (2). Most certainly

the holding company is not to go forth from under the jurisdiction of the Act and still retain within its structure the very abuses which Section 11 (b) (2) was designed to eliminate." On the theory advanced by petitioner, the Commission would be powerless to require a recapitalization under Section 11 (b) (2) even if United had outstanding bonds and preferred stock, as well as option warrants. Nor could the Commission enforce the remaining provisions of the plan, such as those pertaining to the proposed charter amendments for cumulative voting, or require the additional dispositions contemplated by the plan.

Further, it is not an established fact, as petitioner assumes (Pet. 3, 7, 14, 15), that United has already ceased to be a holding company under the Act. The question as to the extent of divestments

---

" See *In re Community Gas and Power Co.*, 71 F. Supp. 171 (D. Del.), affirmed, 168 F. 2d 740 (C. A. 3), certiorari denied, 334 U. S. 844. The plan there involved provided (in addition to the dissolution of Community, the top holding company) that American Gas and Power Co., which had outstanding secured debentures, common stock, and option warrants, should continue in business as an operating company not subject to the Holding Company Act, after its merger with its then operating subsidiary. The plan provided for the elimination of American's debt as well as option warrants and allocation of the new common stock among American's former debenture holders, common stockholders and warrant holders. While the warrant holders did not contest the treatment accorded them in the plan, the debenture holders did challenge the power of the Commission to require them to accept stock, contending that the plan was not necessary and appropriate to effectuate the purposes of the Act. This contention was rejected. See 168 F. 2d at 744.

necessary for United to cease to be a holding company was expressly deferred by the Commission until all the divestments contemplated by the plan are accomplished and an application by United to terminate its registration under Section 5 (d) of the Act is filed with the Commission. Petitioner did not object before the Commission to this provision of the plan, and did not urge before the Commission that a reduction by United of its interest in Niagara Mohawk to less than 10%—rather than the 49% contemplated by the plan—is adequate for compliance with Section 11 (b) (2). Petitioner's motion seeks to anticipate these determinations, in advance of the time and circumstances contemplated by the plan.

3. In the court below the Commission and United—rather than petitioner—argued in favor of the exclusive jurisdiction of the district court to review those provisions of the plan which expressly contemplated enforcement by the district court under Section 11 (e) of the Act and against the jurisdiction of the court of appeals under Section 24 (a).[*] Thus, the petitioner actively

[*] The Commission urged that an order of the Commission conditioned for its effectiveness upon enforcement by the district court is "interlocutory" in that it merely subjects persons adversely affected to further hearings before a judicial tribunal; that a person who under Section 11 (e) has yet to exhaust his "opportunity to be heard" in the district court before the plan may be enforced is "not a person or party aggrieved by an order issued by the Commission" within the meaning of Section 24 (a); that the provisions for notice to all security holders under Section 11 (e) do not

pressed its motion for intervention over the objections of the Commission and United to the jurisdiction of the court below and presented its case to that court for adjudication on the merits. Petitioner expressly represented that assumption of jurisdiction by the court below "of the entire order of the Commission will expedite an early final determination of the case" and that the court below "has jurisdiction under Section 24 (a) of the Act to settle the matter finally * * *" (R. 225–226). Petitioner now contends (Pet. 8, fn. 5) that it may raise this issue "although petitioner did not press it in its pleadings below and was not allowed to argue it orally," since the matter was argued by the Commission.[9] It should be emphasized, however, that, while the order of the court below denied petitioner's request to file a reply and limited its oral argument to the merits (R. 387), the earlier order of the court, allowing petitioner to file a brief, did not in any way limit the issues which petitioner might have presented to that court (R. 234).

The court below held that exclusive jurisdiction of the district court attaches only if enforcement

---

appear to be required under Section 24 (a); and that a district court under Section 11 (e) not only reviews but also enforces the plan and as such, exercises an *in rem* jurisdiction as distinguished from a mere review jurisdiction of the court of appeals under Section 24 (a).

[9] The cases cited by petitioner (Pet. 8, fn. 5), dealing with questions of the citizenship of the parties for the purposes of Federal jurisdiction, are far less than controlling here.

proceedings are instituted prior to the filing of the petition for review in the court of appeals, and that where, as in the instant case, no enforcement proceedings are pending, the court of appeals has exclusive jurisdiction to review the plan in its entirety (R. 399–401). The court noted that in all the cases cited by the Commission in support of its argument against the court's jurisdiction (R. 399–403, 407–408), except *Lownsbury* v. *SEC*, 151 F. 2d 217 (C. A. 3), certiorari denied, 326 U. S. 782, enforcement proceedings were already pending when the petition for review was filed. Although in the *Lownsbury* case the petition for review under Section 24 (a) was dismissed for lack of jurisdiction even though district court enforcement had not yet been initiated, the court below distinguished that case on the grounds that there the entire plan, rather than a part of a plan, was subject to district court enforcement and that the effectiveness of the plan was conditioned upon a vote of stockholders (R. 401).

While we do not agree with the bases upon which these cases were distinguished,[11] it is not

[11] Recognizing that the rationale upon which other courts of appeals have dismissed petitions for review under Section 24 (a) involved broader considerations than its own factual distinctions, the court below regarded these broader grounds as "*obiter dicta*" (R. 402). See, for example, *Okin* v. *SEC*, 145 F. 2d 206, 208 (C. A. 2), remanded on other grounds, 325 U. S. 840.

The court also stated that the statements in the opinions of the other courts "have been rendered nugatory by a subsequent Supreme Court decision," referring to *SEC* v. *Cen-*

clear to us that the differences in point of view between the court below and the courts of other circuits will present future difficulties in administration. This is the first instance in which the Commission has been confronted with a request by the company for district court enforcement only of a portion of a plan when there was also a contest over other provisions in a plan. Generally, the normal procedure is to frame the plan in such a way that review will be had only in one court; or the plan is split into two or more steps and each step successively approved by separate order.[14] In this case the plan took its present form partly in response to a commitment by United to the Commission in 1949 that a comprehensive plan will be submitted by United thereafter in order "to complete the transformation of United into an investment company" (R. 8), and because part of the plan relating to the offer to stockholders to withdraw their pro rata interest in United depended upon market conditions (R. 25) and might have proved im-

tral-Illinois Securities Corp., 338 U. S. 96, 125 (R. 402, 405). In that case, this Court merely held that the scope of review under Section 11 (e) is the same as that under Section 24 (a). It did not involve the question of the circumstances under which exclusive jurisdiction is obtained under either section of the Act. That interpretation of this Court's opinion in the *Central-Illinois* case was expressly rejected by the court in *Leventritt* v. *SEC*, 178 F. 2d 336, 337 (C. A. 2).

[14] Compliance with Section 11 (b) may be accomplished through a series of plans. See *Phillips* v. *SEC*, 185 F. 2d 746, 750 (C. A. D. C.).

practical if delayed until after there could be district court approval and enforcement."

Further, the ultimate statutory objective is to achieve compliance with Section 11 (b) "as soon as practicable." We do not believe that this will be achieved by permitting litigants to raise jurisdictional objections of this nature after they have themselves urged the court to assume jurisdiction and then lost on the merits. If this Court were to grant certiorari on the question of jurisdiction and reverse the court below, petitioner would be accorded another opportunity to have the same issues on the merits tried once more, in the district court; and, thereafter, if the plan should be enforced, to seek review by a court of appeals and perhaps to petition this Court for a writ of certiorari. Since the issues on the merits were correctly decided by the court below and require no further review by this Court, a denial of the writ at this time would obviate this circuitous and dilatory route.

CONCLUSION

The questions raised by the petition on the merits are insubstantial and require no review by this Court. In view of the facts that petitioner urged the court below to take jurisdiction and that it does not now appear to the Commission that the decision of the court below will cause

[18] No stay pending review was sought as to the withdrawal proposal which was consummated before the petition for review was filed in the court below.

inordinate administrative difficulties, this would not appear to be an appropriate case or time for resolution of the conflict of decisions on the question of jurisdiction.

ROBERT L. STERN,
Acting Solicitor General.

ROGER S. FOSTER,
General Counsel.

AARON LEVY,
Attorney, Securities and Exchange Commission.

AUGUST 1953.

APPENDIX

Pertinent Statutory Provisions

The Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79, *et seq.*, provides in pertinent part as follows:

Sec. 1. * * *.

(b) * * *, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized

structure and tend to prevent voluntary rate reductions;

* * * * * *

(c) When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; * * *

SEC. 2. (a) * * *

(9) "Holding-company system" means any holding company, together with all its subsidiary companies, * * *.

* * * * * *

SEC. 5. * * *

(d) Whenever the Commission, upon application, finds that a registered holding company has ceased to be a holding company, it shall so declare by order and upon the taking effect of such order the registration of such company shall, upon such terms and conditions as the Commission finds and in such order prescribes as necessary for the protection of investors, cease to be in effect. * * *

* * * * * *

SEC. 7. * * *

(d) * * *

the Commission shall permit a declaration

regarding the issue or sale of a security to become effective unless the Commission finds that—

(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding-company system;

(2) the security is not reasonably adapted to the earning power of the declarant; * * *.

SEC. 11. * * *

* * * * *

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. * * *

* * * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. * * *

* * * * * *

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission

be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1939